No. 83-30

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MONIKA BAGBY, et al., PETITIONERS

v.

CYRUS VANCE, et al.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The United States, in its Opposition Memorandum, forwards several arguments why this Court should not grant certiorari in the instant case. The United States argues that:

1) Contrary to Petitioner's allegations, the standard of review of dismissals for lack of dilligent prosecution employed by the Ninth Circuit is not in conflict with the standard of review similarly employed by other courts of appeals. (Res. Mem. 6)

2) Counsel for Petitioners failed to serve any named defendants after receipt of the order to show cause why the case should not be dismissed and

discovery that counsel was in violation of local rule 235-11. (Res. Mem. 2)

3) Complex cases such as the case at bar require prompt service to afford defendants adequate time to prepare their cases. (Res. Mem. 4)

4) Permitting a delay in service shortly before the running of the statute of limitations undercuts the purpose of the statute. (Res. Mem. 5)

Petitioners reply to these arguments in sequence.

I

The United States argues that the stardard of review employed by the Ninth Circuit in dismissals for lack of diligent prosecution is not in conflict with the standard similarly employed by other courts of appeals. This argument will not withstand scrutiny.

In the Ninth Circuit, the district courts are free to dismiss cases for lack of diligent prosecution in the sound exercise of their discretion.[1]

The ninth Circuit places no restrictions on the discretion of its district courts to dismiss such cases except that the district court may not abuse its discretion in so doing. No dilatory or contumacious

[1]See Pet. 13, cases cited therein.

conduct by plaintiff is required to uphold such dismissals on appeal.

In other circuits, the courts of appeals have set down in a very clear restriction for their district courts: dismissals of cases for lack of prosecution are proper only where the plaintiff has been dilatory or contumacious.[2]

Thus, to say as the United States does, that there is no conflict between the decision presented here to this Court and decisions of other courts of appeals is a misstatement of fact. To say that there is no conflict between the standard of review employed by the Ninth Circuit in such dismissals and the standard of review similarly employed by other circuit courts of appeals is a misstatement of law.

This argument of the United States lacks merit.

II

Respondents argue that counsel for Petitioners should have served the named defendants after receipt of the order to show cause why the case should not be

[2]See cases, Pet. 12-15.

dismissed since counsel was then put on notice that counsel was in violation of local rule 235-11. Respondents seem to believe that such service by counsel would have effected compliance by Petitioners with the rule. No reading of the rule gleans this result.

Counsel did not serve the respondents after receipt of the order to show cause precisely because counsel realized he was in violation of the rule. Rather, counsel chose to forthrightly explain why he had not effected service on respondents. (Pet. App. E.) Counsel felt that since a hearing was already scheduled regarding the possible dismissal, counsel would wait until after the hearing to effect such service or to undertake whatever course of action was ordered by the district court.

Respondents imply in this argument that there is a lack of good faith on the part of Petitioners in prosecuting this action, as demonstrated by the absence of such service after the receipt of the order to show cause. Petitioners would not have gone

to the time and expense of an appeal and this certiorari petition if Petitioners were not generally interested in going forward with this case.

III

Respondents argue that complex cases such as this one require prompt service on defendants to better enable them to prepare an adequate defense. Whatever merit such argument has as a general rule, it is of no help to Respondents in the instant case.

The various named Respondents have between them almost all of the available information on the extent of governmental involvement in the Jonestown tragedy. Such information has not been forthcoming notwithstanding Petitioners' various requests under the Freedom of Information Act. Respondents cannot say they cannot adequately prepare a defense when they alone, at present, know the full extent of their involvement.

Further, Respondents, at least many of them, have the vast resources of the United States government upon which to draw for legal assistance.

Petitioners' counsel is a sole practitioner. The posture of the parties in this case, Petitioners respectfully submit, renders this argument of the United States illusory.

IV

Respondents' final argument is that the purpose of the statute of limitations is thwarted by permitting a delay in service shortly before the running of the statute. Respondents cite language in Anderson v. Air West (9th cir. 1976) 542 F.2d 522 in support of this arguement.

The language in Anderson, supra, refers to an indefinite delay in service after the complaint has been filed as frustrating the purpose of the statute of limitations. No arguments or documents in the case at bar suggest that Petitioners' counsel intended to indefinitely delay service upon Respondents. Indeed, the district court could have required service within a certain period of time on pain of dismissal. Anderson, supra, is of no help to Respondents, and their argument is inapposite.

As none of the Respondents' arguments are of help to them, Petitioners respectfully request that this Court grant the relief requested in Petitioners' certiorari petition.

Respectfully submitted,

R. J. Bockelman

Robert J. Bockelman
Counsel for Petitioners

Date: October 4, 1983

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PROOF OF SERVICE - AFFIDAVIT

I, Keith Davis, a law clerk in the offices of Robert J. Bockelman, attorney of record for Plaintiffs, Petitioners herein, depose and say that on the 5th day of October, 1983, I served a copy of the foregoing Reply Memorandum of Petitioners on the Solicitor General's Office of the Department of Justice, Washington, D.C., by mail.

I swear that the foregoing is true under penalty of perjury.

Keith Davis

KEITH DAVIS